

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

CALAIS LNG PROJECT COMPANY, LLC)	
CALAIS PIPELINE COMPANY, LLC)	
)	CALAIS LNG PROJECT COMPANY, LLC
NRPA Application:)	AND CALAIS PIPELINE COMPANY, LLC
#L-24843-TG-B-N)	
#L-24843-IW-C-N)	MOTION TO STRIKE CERTAIN
#L-24843-L6-D-N)	PREFILED TESTIMONY SUBMITTED BY
#L-24843-4P-E-N)	SAVE PASSAMAQUODDY BAY/NN,
Site Location of Development Application:)	CONSERVATION LAW FOUNDATION,
#L-24843-26-A-N)	AND DOWNEAST LNG
Air Emission Application: #A-1029-71-A-N)	
Waste Discharge License: #W-9056-5O-A-N)	

CALAIS LNG'S MOTION TO STRIKE PREFILED TESTIMONY

Pursuant to the Presiding Officer's Second Procedural Order dated April 30, 2010, Calais LNG Project Company, LLC and Calais Pipeline Company, LLC (collectively, "Calais LNG") hereby move to strike certain direct testimony submitted by witnesses for Save Passamaquoddy Bay/NN ("SPB"), Conservation Law Foundation ("CLF") and Downeast LNG. Such testimony must be struck because it is either: (1) expressly excluded by the Second Procedural Order, dated April 30, 2010, or the Amendment to Second Procedural Order, dated May 6, 2010; (2) beyond the scope of this hearing; (3) irrelevant; (4) repetitive; or (5) an opinion offered by an unqualified witness.

I. Introduction

The Presiding Officer's Second Procedural Order sets forth the relevant review criteria and the specific issues on which the Board will hear evidence at the upcoming Board hearing. *See e.g.*, Second Procedural Order § 4 at pgs 4-6. The Second Procedural Order was amended on May 6, 2010, giving greater clarity to those issues that are within the scope of the Board's

review. *See* Amendment to Second Procedural Order § 2 at pgs. 2-4 (“Amended Order”). This Amended Order reiterated that a number of issues could not be addressed at the hearing, or would be allowed but only in a limited manner. Those issues either struck or limited in Section 2 of the Amended Order included, among others:

Section A: “Need Ruling: The primary determination of need for the facility is made by FERC. The Board will allow evidence regarding need as it relates to the project purpose and will consider need in the context of the alternatives analysis for wetland impacts under the NRPA.” *See* Amended Order at pg. 2.

Section B: “Economic Impact Ruling: Potential impacts of a proposed project on real estate values are not within the Board’s jurisdiction; therefore, evidence on the issue will not be admissible.” *Id.*

Section D: “Cumulative impact. . . . Ruling: The Board’s consideration of cumulative impact is limited to an assessment . . . of the proposed project together with . . . existing development. The Board cannot speculate about the potential impacts of other similar projects that are not yet approved or constructed.” *Id.* at pg. 3.

Section I: “Safety, catastrophic event. The safety of LNG facilities and tankers is regulated by the Federal Energy Regulatory Commission; the Board does not have jurisdiction on this issue.” *Id.*

Section N: “Expansion of Maritimes & Northeast Pipeline. There are no applications to expand the Maritimes & Northeast Pipeline . . . currently before the Board or the Department; therefore, the potential impacts of such an expansion are not being reviewed in this proceeding.” *Id.* at pg. 4

As described below, certain testimony offered by SPB, CLF and Downeast LNG must be stricken because it contains issues prohibited by the Amended Order.

II. SPB, CLF and Downeast LNG All Offer Direct Testimony Beyond the Scope of the Board's Review.

a. Project Need

1. Dean Girdis

Calais LNG moves to strike the testimony of Mr. Dean Girdis, witness (and project developer) for Downeast LNG in its entirety. Mr. Girdis attempts to couch his testimony, which focuses entirely on Calais LNG's purpose and need, in terms of a Natural Resources Protection Act ("NRPA") alternatives analysis for wetlands impacts. However, when reviewing the entirety of his testimony, it is clear that Mr. Girdis is using the NRPA standard as a pretext to present arguments on issues that the Board has already ruled are not within its purview concerning these applications. Specifically, the Board has ruled both that: (1) the primary determination of need is to be made by FERC (not the BEP)¹ and (2) the potential expansion of the Maritimes and Northeast Pipeline ("M&NE") is not part of the Calais LNG applications and will not be considered.²

The three topic headings of the "Discussion" Section of Mr. Girdis's testimony tell the story. Those headings are:

1. "CLNG Gas Supply Cost;"
2. "CLNG requires expansion of the M&NE pipeline;" and
3. "CLNG is not a competitively priced source of gas to New England."

Topics 1 and 3 deal directly with FERC-regulated issues and Topic 2 has been rejected as part of the Board's review of the Calais LNG applications at several points in this process already.

¹ Second Procedural Order, § 4(A).

² Amendment to Second Procedural Order, § 2(N).

Downeast LNG is asking the Board to go beyond merely considering the technical aspects regarding whether there are alternatives to the particular wetland alteration being proposed as a result of this project -- e.g., could the Calais LNG terminal footprint be adjusted, could the Calais LNG pipeline route be altered, could certain more restrictive construction techniques be utilized at the terminal or along the pipeline route -- to involving itself in the economics of the natural gas marketplace and the competition between business ventures in that marketplace.

The Board clearly is neither charged with addressing, nor prepared to deal with analysis of, the economics of this portion of the energy market. That task is squarely within the jurisdiction and expertise of the FERC. The Board, in its May 6, 2010 deliberations on the appeal of the Second Procedural Order, clearly noted as such, when Presiding Officer Susan Lessard stated:

In making the determination of need or -- as it relates to this project, need in a global sense for natural gas is the -- in a location is the province of FERC. It's less the province of the State of Maine or this Board in its proceedings. When we were discussing need in this ruling, it was in the context of alternatives analysis as part of NRPA and that the need to go through a wetland as opposed to around it or in some way is based on mitigation, et cetera; but the ruling was not intended to imply that this Board was going to get into a discussion of the global need for LNG as a fuel in this context. Lessard Tr. 137:20-138:9.

Further, Assistant Attorney General Bensinger stated during the same deliberations:

I don't recommend that the Board engage in a detailed analysis of the energy picture in the country, and I don't think we have the time or the resources or the expertise to do that. . . . The Department itself and the Board by adopting these rules has said need is part of the analysis of the reasonableness of the impacts to the wetlands and the streams." Bensinger Tr. 139:2-6.

Transcript pages are attached as Exhibit 1.

As Calais LNG has previously stated in this proceeding, FERC possesses exclusive authority to review project need.³ Section 3(e) of the Natural Gas Act (“NGA”) provides that “[FERC] shall have *exclusive authority* to approve or deny an application for the siting, construction, expansion, or operation of an LNG terminal.”⁴ The NGA specifically requires FERC to make positive findings regarding need for the project after consideration of potential alternatives in order to permit the project. Thus, Mr. Girdis is asking this Board to review and determine issues that are at the very heart of FERC's exclusive authority to site LNG terminals and natural gas pipelines.⁵ See *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt. Council*, 583 F. Supp. 2d 259 (D.R.I., 2008); *aff'd, Weaver's Cove Energy v. Rhode Island Coastal Resources Management Council* (589 F.3d 458 (1st Cir. 2009)); see also *AES Sparrows Point v Smith*, 470 F. Supp. 2d 586 (D. Md. 2007); *aff'd in relevant part, AES Sparrows Point v Smith*, 527 F. 3d 120 (4th Cir. 2007). Given FERC's exclusive jurisdiction on this topic, the Board's prior determination that issues of need and alternatives to the project are outside the scope of the instant proceeding is correct, consistent with the Chair's stated view of the proper interpretation of NRPA, and should be enforced.

³ As a predicate of certification under the NGA, an applicant must demonstrate that there is a need for the project. The FERC's Certificate Policy Statement establishes criteria for determining whether there is a need for a proposed project and whether the proposed project will serve the public interest. See *Certificate Policy Statement*, 88 FERC at p. 61,745-61,746. The Certificate Policy Statement explains that, in deciding whether to authorize the construction of major new pipeline facilities, the Commission balances the public benefits of the project against the project's potential adverse consequences. See *Tennessee Gas Pipeline Co.*, 92 FERC ¶ 61,142 at p. 61,519 (2000). The Commission's stated goal is to give appropriate consideration to the enhancement of competitive transportation alternatives, the possibility of overbuilding, subsidization by existing customers, the applicant's responsibility for unsubscribed capacity, the avoidance of unnecessary disruptions of the environment, and the unneeded exercise of eminent domain in evaluating new pipeline construction. *Id.* at pp. 61,519-20.

⁴ 15 U.S.C. § 717b(e) (emphasis added). FERC has exclusive authority to site, construct, and operate natural gas pipelines under section 7 of the NGA as well. See *Schneidewind*, 485 U.S. at 307, 108 S. Ct. at 1154 (Michigan law regulating facilities of interstate natural gas companies is preempted); see also *National Fuel Gas Corp. v. Public Service Commission of NY*, 894 F.2d 571 (2d Cir. 1990) (rejecting New York's attempt to regulate the siting of interstate pipeline facilities).

⁵ In fact, in its FERC applications, specifically Resource Report 10, Calais LNG has provided the FERC with a detailed alternatives analysis as to why the Calais LNG project is needed and why no other proposed or existing LNG facility can satisfy Calais LNG's own specific project purposes.

Tellingly, Mr. Girdis's testimony here is strewn with references to the separate FERC proceedings on this project that are not even part of the record in this case, including at least five different specific footnote references to Draft and Final Resource Reports filed by Calais LNG with FERC. In crafting his thesis as to why there is no need for the proposed alteration of the wetlands, he devolves into detailed discussions of the topics of natural gas market pricing, as well as analyses of the costing of pipeline construction and gas transportation -- all subjects that are irrelevant to these proceedings and squarely and exclusively within the jurisdictional purview of FERC. A glance at page 9 of his testimony speaks volumes, as the text, chart and explanatory chart notes all are in "FERC speak." *See* Exhibit 2.

Mr. Girdis's entire testimony should be struck for the above reasons alone. There is a second basis to strike as well. Mr. Girdis's entire analysis is grounded in a discussion of hypothetical costs of an expansion of the M&NE pipeline and the associated cost of transportation of natural gas through such an expanded pipeline. The Department, as well as the Board, have each previously ruled that considerations regarding any potential expansion of the M&NE pipeline will not be considered in these proceedings. In particular, in a March 2, 2010 letter from Becky Blais (DEP) to Sean Mahoney (CLF), responding to CLF's claim that the applications should be returned as incomplete, Ms. Blais stated:

Due to the fact that the existing Maritimes and Northeast Pipeline (M&N) is owned by a separate entity, the Department views the proposed Calais LNG project as being a separate and distinct project. As a separate project that would require development by an unaffiliated entity, common scheme of development requirements do not apply. Therefore the Calais LNG applications are not required to address the potential need to expand the M&N Pipeline. Any expansion of the existing M&N Pipeline will need to occur as a separate permitting process.

Despite that ruling, CLF filed a "Motion to Return" on April 30, 2010, alleging that potential future expansion of the M&NE pipeline was a common scheme of development and/or

that the cumulative impacts of such an expansion should be considered. Following an opportunity for briefing and oral argument on the issue by the parties, the Board issued its May 6, 2010 Amendment to Second Procedural Order, which explicitly stated in § 2(N):

Expansion of Maritimes & Northeast Pipeline. There are no applications to expand the Maritimes & Northeast Pipeline, which may be used to accommodate the natural gas from the proposed facility, currently before the Board of the Department; therefore, the potential impacts of such an expansion are not being reviewed in the proceeding.

Hence, any analysis of project need based upon potential future expansions, or not, of the M&NE pipeline must also be barred for the same reasons – there is no such application. Thus, testimony regarding potential impacts of such an application, including costs, is nothing but conjecture and speculation and must be stricken.⁶

Mr. Girdis's need-based arguments have another forum -- FERC -- and the Board should reject inclusion of this analysis in this proceeding. Hence, his testimony should be stricken in its entirety. *See Exhibit 2.*

2. Susan Reid

Calais LNG also moves to strike the direct testimony of CLF Attorney Susan Reid in its entirety for two independent reasons: (1) Attorney Reid is not qualified to offer expert non-legal testimony⁷ and is not a fact witness offering testimony of her personal experience; and (2) she offers testimony on barred topics.

First, Attorney Reid is a senior lawyer for CLF who attempts to offer expert witness testimony regarding project need. In her testimony, Attorney Reid argues that Calais LNG's

⁶ In a further bit of irony on this topic, Downeast LNG itself argued strenuously in its own 2007 permit application proceeding before the Board that expansion of M&NE pipeline should not be considered by the Board. The Board agreed with Downeast LNG in that proceeding as well. *See, e.g.,* Downeast LNG Second Procedural Order at § 4. Pressing the Board to consider that topic now is, well, ironic.

⁷ Attorney Reid's testimony is couched as a critique of Calais LNG's alternatives analysis and framed as economic fact opinion, however, it reads like a legal argument written by a lawyer. If Attorney Reid's testimony is considered legal testimony by a lawyer, it must be stricken, as the parties are all represented and the prefiled testimony is not an appropriate venue for legal argument.

alternatives analysis is insufficient based upon her view of supply and demand impacts from other natural gas sources in the market. By her own admission, however, Attorney Reid -- a paid lawyer for CLF -- is an advocate for the group's position regarding LNG. *See Reid Test.* at pg. 1 ("I have played a significant role with respect to CLF's advocacy regarding a number of LNG projects").

Attorney Reid is not an expert in the economics of energy markets. She has no economics background; rather, she has a bachelor's degree in political science and a law degree. It is not clear whether she has even taken a course in economics, let alone the high level courses necessary to do expert economics analyses regarding complex energy markets. Further, she does not appear to have published any peer reviewed work on the economics of energy markets, including the supply and demand aspects of natural gas to which she testifies.

Since Attorney Reid is not qualified as an expert in economics or energy markets to fully examine all of the demand and supply side impacts from the Calais LNG project,⁸ she is not qualified to offer expert testimony regarding the economic impacts or need for the Calais LNG project. Nor is she a fact witness offering testimony based on personal experience. Therefore, her testimony and related exhibits should be stricken in their entirety.

Second, Attorney Reid's testimony is exclusively about purpose and need for a regional LNG facility -- a topic that has already been excluded in this case three separate times: by the Department, the Chair, and after appeal, the full Board. As discussed above, the Board has previously recognized that the FERC has exclusive jurisdiction regarding an evaluation of project "need." *See Amended Order* § 2(A). In the context of the NPRA standard, the evaluation of project purpose and need is therefore limited to the context of the wetlands

⁸ Similarly, Ms. Reid does not seem to have any formal science background or training, yet she testifies about lifecycle analysis for carbon dioxide emissions related to LNG.

alternatives analysis, such as alternative pipeline routes. Like Mr. Girdis, however, Attorney Reid wrongly tries to use the NRPA language to open the door to debate the overall need for LNG and its environmental impacts – issues that fall far outside of the context of the wetlands alternatives analysis. For example, Attorney Reid argues on page 8 of her prefiled testimony that “the assumption that New England needs additional supplies of natural gas to meet its energy needs is outdated and incorrect.” She also testifies on page 4 (couching the statements in the context of CLF’s position) that “the need for any new LNG supplies or infrastructure in New England has declined precipitously in recent years.” Not only is Ms. Reid not qualified to offer such opinions, this testimony on project need is beyond the NRPA/wetlands-related scope of this issue and should be stricken. *See* Exhibit 3.

b. Economic Impact – Property Values

CLF witness Gregory Dexter offers testimony that his property’s current value will be negatively impacted by Calais LNG. His statements on this subject matter are in direct conflict with the Board’s ruling on this subject. *See* Amended Order at pg. 2. Therefore, Mr. Dexter’s testimony relating to property values must be stricken. *See* Exhibit 4.

c. Cumulative Impact

CLF witness Art MacKay offers as a portion of Exhibit CLF/SC-7 to his direct testimony two slides that relate to cumulative impacts of LNG development. This is in violation of the requirements of the Second Procedural Order § 4(D). Page 17 of Exhibit CLF/SC-7 includes a slide entitled “There are Two Proposed Terminal Sites, May 2010.” Page 18 of that Exhibit includes a slide entitled “30% -100% Downtime for the Tourism, Fisheries, Transportation and Aquaculture Business.” That slide also states that 2 to 9 ships per week could pass through Passamaquoddy Bay. (It should be noted that Mr. MacKay offers no citations, no calculations

and no references for his assertions that there will be a 30% to 100% decline in those industries.) In addition, at most the maximum amount of LNG shipments for Calais LNG would be two per week (during the winter when the waterway has the least traffic). Therefore his slide presents testimony on cumulative impacts of all LNG facilities in Passamaquoddy Bay and should be struck. *See* Exhibit 5.

d. Safety; Safety and Security Zones

The Amended Order holds that safety of LNG facilities and vessels are regulated by FERC and that the Board does not have jurisdiction on that issue. *See* Amended Order § 2(I) at pg. 3. Despite the Board's clear instruction, numerous CLF and SPB witnesses allege in their direct testimonies that the Calais LNG project will require the presence or placement of armed escorts, helicopter escorts, search lights, siren systems, community shelters, gun boats, etc. Despite vague references to such "Homeland Security requirements," not one witness offers any citations or evidence of such requirements in their direct testimonies. Hence, not only are these statements clearly outside of the scope of the Board's review because of their subject matter, they are also unsupported, speculative and prejudicial.

Several SPB and CLF witnesses have referenced "hazard zones," which fall squarely within the Board's ruling excluding evidence on safety and catastrophic events. *See* Amended Order at § 2(I). Hazard zone calculation and assessment is undertaken by the U.S. Coast Guard during its review of a proposed LNG project's Waterway Suitability Assessment. Hazard zones are those zones associated with a large release of LNG and are a risk-based calculation. Actual hazard zones (or "Zones of Concern") depend on variable factors such as type of vessel breach, spill size, site-specific conditions, and environmental conditions. Hazard zone analysis predicts impacts to humans, property and infrastructure, not environmental impacts. *See, e.g.,* Sandia

Report, *Guidance on Risk Analysis and Safety Implications of a Large Liquefied Natural Gas (LNG) Spill Over Water*, Sandia National Laboratories, December 2004; Downeast LNG Waterway Suitability Report, U.S. Department of Homeland Security, United States Coast Guard, January 6, 2009; Calais LNG Waterway Suitability Assessment, ABSG Consulting Inc., August, 2009. Hazard zones by their very name, nature and calculation, relate only to the “safety and catastrophic event” category so clearly excluded by the Amended Order’s § 2(I). Testimony on hazard zones, therefore, must be struck.

Based on their discussion of safety and catastrophe-related topics, the following testimonies by SPB witnesses must be struck: Hugh Akagi, pgs. 4, 8; Vera Francis, pg. 3; Linda Godfrey, pgs. 8, 9, 11; Robert Godfrey, pgs. 2 and 4; and Jeff and Kate Wright,⁹ pgs. 6-7. *See* Exhibits 6 through 10. Witnesses offering similar testimony, which must be excluded, for CLF included: Sarah Strickland, pg. 9; Art MacKay, Exhibit CLF/SC-7 at pgs. 18-20; and Cliff Goudey, pg. 2 and Exhibits CLF/SC 9 and 10.¹⁰ *See* Exhibits 5, 11 and 12.

III. SPB, CLF and DOWNEAST LNG Present Direct Testimony that is Either Irrelevant, Hearsay, Redundant or Not Qualified to be given by Fact Witnesses.

a. Relevance

1. Gary Napp

Calais LNG moves to strike a portion of Gary Napp’s testimony. Mr. Napp, a witness for Downeast LNG, testifies that the National Park Service (“NPS”) and U.S. Fish & Wildlife Service (“FWS”) asked the Downeast LNG project to include the St. Croix Island International Historic Site (“St. Croix Island IHS”) as a Class I area in its visibility and air deposition analysis.

⁹ Jeff and Kate Wright also make the misleading and prejudicial comparison of the safety of the proposed Calais LNG project with a recent explosion at a natural gas-fired power station (not an LNG facility) in Middlebury, CT at page 8 of their pre-filed testimony. This comment fits squarely within the Board’s holding on safety and security of LNG terminals and therefore also should be struck. *See* Exhibit 10.

¹⁰ Not only do Mr. Goudey’s CLF/SC-9 & 10 inappropriately discuss safety and security issues, they are also letters written to FERC about the Downeast LNG project, which is a separate project and is not the subject of the Board’s review. Hence, these exhibits should also be stricken on the grounds that they are not relevant.

See Napp Testimony, pg. 6. Calais LNG moves to strike this portion of Mr. Napp's testimony as well as his visibility air analysis that incorporates this information because: (1) St. Croix Island IHS is not a Class I area and allowing testimony that it should be considered as such will be confusing to the Board; (2) any NPS statements to Downeast LNG presented here are hearsay; and (3) the type of information that Downeast LNG was asked analyze for *its own* permit application is not relevant to Calais LNG's permit application. Therefore, Mr. Napp's testimony should be stricken.

St. Croix Island IHS is *not* a Class I area. As stated in 38 M.R.S.A. § 583-B, the areas that have been established as Class I areas are: Acadia National Park, Moosehorn National Wildlife Refuge, and Roosevelt Campobello International Park. Further, St. Croix Island IHS does not even fit the federal definition of a Class I area. 42 U.S.C.A § 7472(a). Instead, St. Croix Island IHS, similar to Devil's Head, is a Class II area. 42 U.S.C.A § 7472(b). There are specific federal and state regulatory requirements for redesignating an area as Class I. See 42 U.S.C.A § 7474; 583-B; 38 M.R.S.A. § 583-B(5). However, no action has been taken to redesignate St. Croix Island IHS as a Class I area. Calais LNG has -- correctly -- not modeled St. Croix Island IHS as a Class I area. Furthermore, a visibility air analysis is not required for a minor source permit under DEP regulations. See, e.g., DEP Rules Chapter 115.

Of note, Downeast LNG's own December 2006 FERC and State air applications did not include St. Croix Island IHS as a Class I area. Instead, Mr. Napp asserts that Downeast LNG was later requested, as part of the FERC permitting process, to consider St. Croix Island IHS as a Class I area. The approach apparently was discussed in telephone conversations with NPS and FWS in August of 2009 and May of 2010. Calais LNG itself was in active discussions with FERC and DEP in August of 2009 and had submitted its applications and had them deemed

complete for processing by the DEP's Air Bureau by May 2010. Despite those extensive interactions, Calais LNG was never asked by FERC, DEP or any other regulatory agency (permitting or otherwise) to consider St. Croix Island IHS as a Class I area for air modeling purposes.¹¹

Furthermore, Mr. Napp's testimony regarding statements by NPS to Downeast LNG is hearsay and should not be admitted as evidence at the hearing. Although Calais LNG is aware that the Board is not a court, Chapter 30(10) of the DEP Rules states "evidence which is relevant and material to the subject matter of the hearing and is a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible." Mr. Napp's hearsay testimony on what NPS told him regarding a competing project in the context of working on that other project is not the type of evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs. It could not have been relied upon by Calais LNG and should not be relied upon by this Board.

The Board has previously warned Downeast LNG that this is not a hearing to evaluate Downeast LNG's project.¹² See Third Procedural Order § 2 at pg. 3. Nevertheless, Downeast LNG has attempted to interject aspects of its own permitting application process into this hearing. Calais LNG is a separate project from Downeast LNG. What specific entities told Downeast LNG it had to do to support its own permit applications is not relevant to this proceeding. To rule otherwise would require an applicant to discover what previous applicants

¹¹ In point of fact, Calais LNG has met numerous times with representatives from NPS and was never asked to consider St. Croix Island IHS as a Class I area for air modeling purposes.

¹² The Third Procedural Order at pg. 3 states:

Downeast LNG is reminded that the current proceeding is a hearing on the Calais LNG project and not a review of any application that Downeast LNG may submit in the future. Any and all testimony submitted by Downeast LNG shall be directly related to the licensing criteria as they apply to the Calais LNG proposal.

were told by every stakeholder and then perform the same analysis. This is not the way that the process is structured and it should not be changed for this hearing.

Because Mr. Napp's consideration of St. Croix Island IHS as a Class I area is the crux of his visibility analysis, this analysis, as well as the specific references to what Downeast LNG was told to consider, should be stricken from his testimony, specifically pages 2-8 and Exhibits Downeast LNG-3-B and 3-C. See Exhibit 13.

2. Terrance Dewan

Mr. DeWan, who examined visual impacts of the Calais LNG project, testifies that visual impacts as seen from a portion of a private property should be included in Calais LNG's visual impacts assessment due to the possibility that such property may be acquired by the National Park Service in the future. Mr. DeWan testifies at pages 3 and 4 that in the future, the NPS *may* acquire the currently privately-owned Pettegrove-Livingstone House. This acquisition would make the Pettegrove-Livingstone House part of the mainland portion of the St. Croix Island IHS.

Although the Calais Terminal, Pier, and vessel at berth will not be visible from the St. Croix Island mainland visitor center or lookout, Mr. DeWan argues that the Terminal could be visible from the privately owned Pettegrove-Livingstone House property. Mr. DeWan attaches pictures that appear to be taken from the shore of this property at low tide, which he claims would allow someone to see the Project. Mr. DeWan further testifies that the visual impacts from the Project on this property would make the overall visual impacts adverse and unreasonable.

Department Rules Chapter 315, §§ 5(H) and 10 define those public natural resources and public lands which are "scenic resources" and for which impacts to existing scenic and aesthetic uses must be evaluated. Likewise, the list of scenic resources in the rules starts with the

predicate that “[t]he following *public* natural resources and *public* lands are usually visited by the general public, in part with the purpose of enjoying their visual quality.” *Id.* § 10. Moreover, no private properties are listed as scenic resources. *Id.*¹³ The Pettegrove-Livingstone House is privately owned and cannot be visited by the general public. Moreover, it is unknown whether this property will ever be owned by the NPS. Mr. Dewan’s testimony, therefore, asks the Board to consider visual impacts to private property, which is clearly outside the scope of Department rules.

Whether or not the NPS will purchase a particular property to be part of the St. Croix Island IHS in the future is speculative; potential impacts resulting from a speculative possible future purchase of private property by a public agency is neither relevant nor within the scope of the Board’s review. DEP Rules Chapters 315 and 375, which contain requirements for visual impact assessment, do not contemplate impacts to lands that *may become* regulated scenic resources in the future. It is therefore beyond the Board’s review to attempt to consider the potential impact on any possible future scenic resource area that might fit within the parameters governed by the DEP visual assessment protocols.

The Board should reject this effort by Downeast LNG to stretch the scope of the Board’s analysis beyond current regulations and strike Mr. Dewan’s testimony regarding analysis of the visual impacts to the Pettegrove-Livingstone House at pages 3-7 and Exhibit DLNG-2-B. Additionally, Mr. DeWan’s testimony at page 12 that there may be adverse visual impact to

¹³ The fact that the Pettegrove-Livingstone House is on the National Register of Historic Places is immaterial. Although the DEP Rules Chapter 315, § 10(D), include registered historic places as scenic resources, the explanation in § 10 and the list of examples make clear that only publicly-owned historic places are considered scenic resources. To the extent that privately-owned historic places are considered in the rules, the Board may only consider the view *of*, not the view *from*, the private historic place. This is so because the general public cannot visit private property, and therefore such locations are essentially “no trespass” sites and the view must be deemed of “no special significance.” *Id.*

Devil's Head from future uses should also be stricken as speculative changes in use beyond the scope of the Board's review.

The extent of these errors warrants exclusion of Mr. DeWan's entire testimony. Mr. DeWan's repeated reliance upon views of the project and Devils Head from the private Pettegrove-Livingstone property (*see*, pp. 5-7, 13 and Exhibit DELNG-2-B) is inseparable from, and therefore fatal to, Mr. DeWan's overall conclusions at page 2-3. Accordingly, his entire analysis is tainted and must be stricken. *See* Exhibit 14.

b. Redundant Testimony

SPB has submitted the testimony of eleven (11) fishermen who fish the waters off of Eastport, including the St. Croix River, Western Passage and Grand Manan Channel.¹⁴ It is unnecessary and unduly repetitious to have eleven SPB witnesses all addressing the same concerns from the same perspective. In its Third Procedural Order, the Presiding Officer ruled that "[e]ach party shall eliminate excessive duplication in its testimony." *See* Third Procedural Order at pg. 3. There is little deviation among the eleven fishermen's direct testimony regarding their concerns about the presence of LNG vessels and the effect on the Passamaquoddy Bay fishery.

These eleven pre-filed testimonies are nearly identical in substance and scope. The eleven fishermen all fish the waters through which the LNG vessels will transit and all express concerns regarding how the presence of the LNG vessels may affect the fishery. It is therefore wholly unnecessary for the Board to be presented with eleven witnesses, when one or two would clearly suffice. In addition, it appears likely that many of these witnesses are either related by family or are business partners (there are two witnesses with the last name "McPhail" and four

¹⁴ The witnesses are: Angus McPhail, Peter McPhail, Brent Griffin, Dale Griffin, Jeff Griffin, Timothy Griffin, Scott Emery, Mike Corthell, Justin Matthews, Charlie Stanhope, and Ricky Wright.

with the last name “Griffin,” plus Angus McPhail and Charlie Stanhope are associated -- serving as each other’s sternman). SPB did not independently withdraw duplicative and repetitive witnesses, therefore the Board should exercise its discretion and strike duplicative testimony.

c. Witness Qualifications

Calais LNG objects to the opinion testimony offered by fact (or “lay”) witnesses. Fact witnesses are those individuals who have direct, personal knowledge relevant to issues in a case.¹⁵ In contrast, an expert witness is one who is “qualified by knowledge, skill, experience, training, or education to provide a scientific, technical or other specialized opinion about . . . a fact issue.”¹⁶ A number of SPB and CLF fact witnesses have offered opinions that are not based on first-hand personal knowledge. Because these witnesses do not have the requisite training, experience or education to be deemed expert witnesses, those aspects of such testimony must be struck.

1. Steven Wildish

According to Steven Wildish’s curriculum vitae, he is both a zoologist and a marine ecologist with particular interests in amphipod ecology. *See* Exhibit CLF/SC-4. Based on his academic and professional focus on marine ecology and zoology, he is not qualified to provide direct testimony relating to earthquakes, geology, geophysics, or seismicity. Dr. Wildish’s prefiled testimony on page 2 therefore should be stricken.

Further, Dr. Wildish, despite acknowledging that he is not an expert in LNG and that he does not know what the effects of an LNG spill would be, nevertheless implies that there would be a negative impact from a release, which he attributes to one of two mechanisms: rupture of

¹⁵ Lay Witness is “[a] witness who does not testify as an expert and who is therefore restricted to giving an opinion or making an inference that (1) is based on firsthand knowledge, and (2) is helpful in clarifying the testimony or in determining facts.” BLACK’S LAW DICTIONARY (8th ed. 2004).

¹⁶ *Id.*

facilities due to earthquake or spill relating to collision in transit. Because he is not qualified to identify those mechanisms by which he alleges the environment might be impacted as the result of an LNG spill, his testimony relating to release of LNG as a result of seismic activity (on pages 3-4) or ship spills (on pages 3-4) should also be stricken. *See* Exhibit 15.

2. Cliff Goudey

Similarly, Mr. Cliff Goudey, witness for CLF, has MIT degrees in naval architecture, marine engineering and mechanical engineering. Despite having no chemistry background or experience in the petrochemical field, he nevertheless offers direct testimony on safety risks posed by the properties of LNG. *See* Goudey Testimony at page 2. Mr. Goudey, who in 2007 was a witness for SBP in the Downeast LNG hearings, has admitted that he has no specialized knowledge regarding LNG. “I simply want to state that atmospheric diffusion is not my field.” *See* Exhibit 16 (July 19, 2007 Downeast LNG Transcript at pg. 286).

In addition, although Mr. Goudey does have an extensive background in naval architecture, he has admitted to having no actual experience with regard to ship impact analysis. Again, at the Downeast LNG hearings, he stated, “structural analysis of the consequences of grounding is a very specialized field in naval architecture. I wouldn’t do it but I know people who can and can look at this” *See* Exhibit 16 at pgs. 215-216. He later stated “my specialty within naval architecture is not ship structures.” *See* Exhibit 16 at 229. Despite having no expertise in ship structure topics, he nevertheless, on pages 3 and 4 of his direct testimony and in CLF/SC-9 and CLF/SC-10, offers an opinion on structural impacts to LNG vessels. Lacking specific knowledge, both in 2007 and still again in 2010, Mr. Goudey’s unqualified testimony relating to both LNG spill impacts and structural impacts to vessels should be stricken from the

record. *See* Exhibit 12. In addition, as discussed above, the safety of LNG tankers is expressly excluded by Amended Order § 2(I).

3. Arthur MacKay

CLF Witness Arthur MacKay is a biologist with particular training in zoogeography, ecology and taxonomy. *See* MacKay Testimony at pg. 1. His testimony offers opinions on impacts of the proposed project to the natural resources of Passamaquoddy Bay. *Id.* However, his testimony diverges far from his areas of expertise. For example, among other things, he provides an un-referenced and unsupported sweeping assertion regarding the qualities of LNG and its impacts if released. Nothing in Mr. McKay's background suggests that he is an expert in LNG and its effects upon the environment. Therefore, his testimony on pages 3 and 4 of his testimony (as well as certain graphics within Exhibit CLF/SC-7) should be stricken as he is unqualified to offer such opinions. *See* Exhibit 5.

4. Vaughn McIntyre

SPB Witness Vaughn McIntyre, an "experienced executive" with "extensive sales, sales channels and Marketing expertise" offers testimony explaining his recent role in assisting the Town of St. Andrews to attract additional cruise ships to the Passamaquoddy Bay region. *See* SPB-25. His marketing-related testimony, however, soon turns to offering unqualified opinions on issues, subject matter and industries for which he has no experience or qualifications. For example, he asserts that various industries such as fishing will see operations reduced by more than 25%, without providing any further information explaining his calculations. *See* Vaughn Testimony at pg. 2. In addition, he offers testimony on LNG vessel size, maneuverability as compared to cruise ships and the difference between their respective propulsion systems. *Id.* at pg. 4. He further states that LNG is a "highly volatile gas" that could be destructive due to a

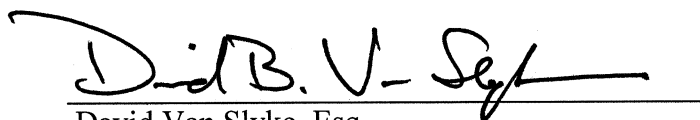
number of factors, including leak or shipping error (which again, is excluded by Amended Order § 2(I)). *Id.* at pgs 4-5. Neither Mr. Vaughn's curriculum vitae nor his written testimony reflect any experience in the shipping, chemistry or marine risk assessment fields. For all of those reasons, the testimony highlighted above that exceeds the scope of Mr. Vaughn's expertise as a marketing executive should be stricken. *See* Exhibit 17.

IV. Conclusion

For the reasons stated above, Calais LNG asks the Board to strike the above-described direct testimonies of SPB, CLF and Downeast LNG witnesses because they violate the Board's Procedural Orders, present testimony that is either irrelevant, redundant or beyond the scope of the Board's review, contain hearsay or provide opinions with regard to subjects for which the witness is not qualified to opine. To assist the Board in its analysis of this request, Calais LNG has highlighted the language proposed to be struck in the testimony of each of the witnesses and listed the exhibits or portions thereof to be struck.

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Respectfully submitted,



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